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NOVEMBER 8. 1739.

A N S W E R S

F O R

*Mrs. Barbara Makdougall of Makerstoun,
and George Makdougall, Esq; her Hus-
band, for his Interest,*

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T O T H E

Petition of *Thomas Makdougall*, Uncle to
the said *Mrs. Barbara*.

THE Estate in Question was *anno* 1634 possessed by Sir *William Makdougall* of *Makerstoun*, and was loaded with Debts almost equal to the Value of it; and in that Year he wadset the same to the Earl of *Roxburgh* and his Son, in Security of a Sum of 64,500 Merks, and for Relief of such other Sums as the Wadsetter should either pay or engage for, on Account of Sir *William*; and in the Year thereafter, the Wadsetters, with Consent of the Reverser Sir *William*, granted two new Wadsets of certain Parcels of the Estate, in Favour of *Robert Makdougall*, a younger Brother of Sir *William's*, the Sums for which they were granted extending in Whole to 40,000 Merks; and *Robert* the Wadsetter having died without Issue, was succeeded therein by *Barbara Makdougall*, the only Child of *Thomas* his immediate elder Brother, as his Heir of Conquest,

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as appears from her Titles made up by Service, and Infestment in the Lands.

Which Titles so made up by *Barbara*, are sufficient to show, that the State of the Rights are misrepresented in the Information of the Case of our opposite Party, where in *p.* 2. it is asserted, " That it is uncertain, whether the Right " of these two Wadsets for 40,000 Merks devolved upon the " aforesaid *Barbara*, or upon *Henry Makdougall* her Cousin, the Son of Sir *William* aforesaid."

Henry the eldest Son of Sir *William* finding his Father's Estate thus loaded with Debts, did not think fit to make up his Titles to the same by Service, as Heir to his Father, or to represent him, but married his Cousin *Barbara*, who had Right to the two Wadsets for 40000 Merks, and who of consequence had a far greater Interest in the Estate than *Henry* her Husband had.

For *Turnbull* of *Minto*, upon a small Debt of Sir *William's*, had adjudged the Estate from *Henry* his Son and apparent Heir, and thereby carried a Right to the Reversion of the Wadsets, and completed his Adjudication by Infestment, and disposed the same in Favours of Sir *William Scot* of *Harden*, who thereupon used an Order of Redemption against the Earl of *Roxburgh* of the Wadset that stood in his Person; and obtained a Declarator of Redemption, and also a Renunciation of the Wadset from the Earl.

And the Method taken for making up a Title to the Estate of *Makerstoun* in the Person of *Henry* was this: *Barbara* his Wife did in *anno* 1668, with Consent of him her Husband, dispose her Rights in favour Sir *William Scot*, who had thus the full Right of the Estate vested in him, having acquired both the Wadsets that stood in the Person of the Earl of *Roxburgh* and of *Barbara Makdougall*, and he carried the Right of Reversion by the Purchase of *Minto's* Adjudication, whereof the Legal was at this Time expired.

In the same Year 1668, Sir *William Scot*, upon a Recital
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of these Titles acquired by him, did, for diverse good Respects and Considerations, dispoſe the whole Estate to the ſaid *Henry Makdougall* in Liferent, and to *Thomas Makdougall* his only lawful Son, procreate betwixt him and the ſaid *Barbara Makdougall*, Lady *Makerstoun*, his Spouſe, and his Heirs-male; which failing, his Heirs and Assignies whatsoever in Fee, under a Condition that the Diſponees ſhould ſtand bound to relieve the Diſponer of the whole Conditions contained in the Decreet of Declarator of Redemption, and of the Renunciation of the Wadſet obtained from the Earl of *Roxburgh*, and with a Reſervation of ſo much of the Lands and Profits of the ſame, as would extend to the Annualrents of the Sum of 54000 Merks, paid by him to the Earl of *Roxburgh* for Redemption of the Lands, with a Reſervation alſo of a Liferent-right to *Barbara Makdougall* Lady *Makerstoun*, of the Lands which formerly belonged to herſelf; and with this further Proviſion: that notwithstanding of the Fee conceived in favour of *Thomas Makdougall*, it ſhould be lawful to the ſaid *Henry* the Father, at any Time during his Life by himſelf, without the Conſent of his ſaid Son, to ſell, annalzie, and diſpoſe the Lands in haill or in Part, and to diſpoſe of the ſame as he ſhould think expedient during his Lifetime, as freely as if the full Right and Fee of the Lands had ſtood in his Perſon, and that his ſaid Son were not provided thereto. And it is further declared, That the ſaid *Thomas* the Son and his Heirs ſhould be held bound to pay all lawful Debts and Sums of Money contracted, or to be contracted by his ſaid Father, and which ſhould be reſting the Time of his deceaſe, in caſe the ſame ſhould not be otherwiſe ſecured, and to keep and fulfil all Bonds, Contracts, and Tacks that ſhould be made and granted by the ſaid *Henry* the Father, anent the Premiſſes in the ſame Manner, as if the ſaid *Thomas* the Son and his foreſaids were to ſucceed as Heirs of Line to the ſaid *Henry* the Father.

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Upon this Disposition from Sir *William Scot*, a Charter under the Great Seal was obtained in the same Year 1668, whereby the Lands are taken to *Henry* the Father in Life-rent, and *Thomas* the Son in Fee, whereupon Infestment followed; but as the Lands at this Time held simple Ward of the Crown, so in the Year thereafter 1669, *Henry* for himself, and as Administrator for his Son, resigned the Estate of new, and obtained a Charter in the same Terms as contained in Sir *William Scot*'s Disposition, except that the Holding was converted by the Crown from simple to Taxward, and in the same Year both Father and Son are of new infest upon this Charter.

And upon the Foot of these Investitures, which contain no prohibitory Clauses, but vest the Estate in *Thomas* and his Heirs in Fee simple; the Estate has been posselt by the Family ever since, for now the Space of Seventy Years.

In the Year 1692, *Henry* the Father died, and *Thomas* his Son standing already infest in the Fee, had no Occasion to make up any other Titles, but acted as Proprietor of the Estate, and as such granted several Infestments in the Lands.

This *Thomas* also died anno 1702, leaving behind him three Sons, *Henry* his eldest, who was Father to the Respondent Mrs. *Barbara* the present Lady *Makerstoun*, *Thomas* his second Son, who is the present Petitioner, and *William* his third also yet alive; and upon the Death of *Thomas*, he was succeeded by *Henry* his said eldest Son, who made up his Titles by special Service to his Father upon the Foot of the Investiture 1669, and was thereupon infest.

And anno 1715, having no other Issue than *Barbara Makdougall* the present Respondent, and considering that by the Destination contained in the Investiture 1669, the Estate stood devised to the Heirs-male of *Thomas* his Father, whom failing to his Heirs and Assignies whatsoever, whereby *Thomas*,
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Henry's immediate younger Brother, would have, upon the Foot of these Investitures, succeeded to the Estate failing Heirs-male of the Body of *Henry*, even preferably to *Henry's* own Daughter; and as at this Time *Thomas* the Brother and presumptive Heir-male was judged by *Henry* and all his Friends, as well as every other Body, a very unfit Person to represent the Family, and that as *Henry* enjoyed the Estate, so far as appeared from the above mentioned Investitures, in Fee-simple, whereby he was at full Liberty to alter the Course of the Succession, therefore the said *Henry* made a new Disposition and Settlement of the Estate, by executing a Bond of Tailzie in favour of himself and the Heirs-male to be procreate of his Body, whom failing to the said *Barbara* his then only Child, and the Heirs-male of her Body, whom failing to *William Makdougall* his youngest Brother, and the Heirs-male of his Body, whom failing, his own other Heirs-male, whom failing, his Heirs and Assignies whatsoever; with this only Limitation, That the Heir should bear the Name and Arms of the Family, and that the Husbands of the Heirs-female should also assume the same: And at the same time he settled an alimentary Provision upon *Thomas* his immediate younger Brother, he not being esteemed *rei sui providus*, or indeed capable of managing any Affairs; and he also gave an additional Portion to his youngest Brother *William*, over what was left to him by his Father, and appointed him, among other Friends, to be Tutor and Curator to his Daughter *Barbara* during her Minority.

Anno 1722 this *Henry Makdougall* died without Issue-male, and was succeeded by the Respondent *Barbara* his only Daughter, who was served Heir to him upon the Disposition 1715, and was inest in the Estate, and was, until the Commencement of this Process, considered by her Uncle *William*, as well as all her other Friends, as undoubted Fiar of the Estate, and as such her Uncle *William* received from her Payment of his own Portion.

This Estate of *Makerstoun*, upon Mrs. *Barbara Makdougall's* Accession to it, was still greatly incumbered with Debts, insomuch that the Residue of the Rents was hardly sufficient for her Aliment and Education, as appears from the Declarations of her Uncle *William* and her other Curators, marked in their Sederunts.

So that it was thought adviseable, in order to prevent the Estate being sunk, that she should bestow herself in Marriage upon some young Gentleman who might be agreeable to her, and could bring in some reasonable Sum of Money by way of Portion, towards sinking the Debts, and thereby preserving the Family.

And for that Purpose, in *February* 1733, a Marriage Settlement was executed between Mr. *George Hay* second Son to Sir *John Hay* of *Alderston*, and the said Mrs. *Barbara Makdougall* of *Makerstoun*, with Consent of *William Makdougall* her Uncle, and others of her Curators, whereby Mr. *Hay* contracts the Sum of *L. 1500 Sterling*, to be applied for extinguishing the Debts upon the Estate, by taking Discharges of them, so as that at no Time thereafter they should remain a Burden upon, or affect the same; and as Mr. *Hay* had a Commission in the Army, in which he still continues to serve, he provided the Liferent of the Half of the Conquest during the Marriage to the Lady, and the Whole of it to the Heirs of the Marriage in Fee; and upon the other Part the Lady, with Consent of her Mother and Curators, dispones the Estate to her Husband in Liferent, and to herself and the Heirs-male of her Body, in that or any other Marriage, in Fee, whom failing, to *William Makdougall* her Uncle and the Heirs-male of his Body, with several further Substitutions; and the Marriage-contract further provides, That it shall take effect even although it should dissolve within Year and Day without Issue; whereby in such Event the Fortune of the Husband would have been sunk in the Family of *Makerstoun* for ever.

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This Marriage took effect, and the Sum provided by the Husband was applied in the Terms of the Contract, and the Husband laid out a considerable Expence in the Improvement of the Estate, though hitherto there has been only Issue female of the Marriage.

In the Year 1738, and no sooner, the Respondent the Lady *Makerstoun*, who always had been considered as Proprietor of this Estate, and who, as such, was disposed of in Marriage with the special Advice and Consent of *William* the only one of her Uncles who was judged capable of Business, was surpris'd with a Claim set up in the Name of her Uncle *Thomas*, in order to deprive her and her Husband and their Issue of the Property and Possession of this Estate, founded upon an old latent Bond of Tailzie, said to be made in the Year 1684, by *Henry Makdougall* her Great-grandfather, and to have been but lately discovered by her Uncle *William*, who says, *He found it lying in a Pock amongst useless Papers that were in the Possession of his Sister Barbara deceased; and owns that before his Niece's Marriage he knew that there was such a Writ in his Sister's Custody.*

By this latent Deed 1684, *Henry Makdougall*, to whom Sir *William Scot* had disposed the Estate in Liferent anno 1668, but with the reserved Powers that have been above noticed, executes a Bond of Tailzie, containing a Procuratory of Resignation of this Estate in favour of himself in Liferent, and *Thomas* his only Son in Fee, and the Heirs-male of his Body, with several Substitutions over, and containing a Prohibition upon the Heirs of Tailzie to alienate the Lands, contract Debt, or alter the Course of Succession, with Clauses irritant in case of Contravention, with a Power reserved to himself to alter, and a Clause dispensing with the Delivery in his own Lifetime; but nothing further followed upon it, nor was the Procuratory therein contained ever executed, whereby it could not be any Title for attaining Possession of the Lands.

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The Respondents, in order to remove the Claim set up by *Thomas Makdougall*, founded upon this latent Deed, *anno* 1684, and for establishing their own Title to the Lands, brought their Action of Reduction and Declarator, for reducing and setting aside the foresaid latent Deed *anno* 1684, and for declaring their own undoubted Title to the Lands, in force of the former Investitures in 1668 and 1669 above recited, and the continued and uninterrupted Possession had upon them ever since : For that

The foresaid latent Bond of Tailzie 1684 was void from the Beginning, as not having been executed in due Form of Law.

2^{dly}, For that supposing that the said Bond could be held as duly executed, it was void for Defect of Power in the said *Henry Makdougall* to make or execute such Bond.

3^{dly}, For that the foresaid Bond of Tailzie in the 1684 was lost by the negative Prescription, the same being latent, and no Document taken upon it for the Space of about fifty four Years.

4^{thly}, For that the Respondents had attained an undoubted Right to the Estate in question by the positive Prescription, they and their Predecessors having possessed the same upon the Foot of the ancient Investitures *anno* 1668 and 1669, without Interruption, a Space of seventy Years.

5^{thly}, For that by the Contract of Marriage past betwixt the Respondents *anno* 1733, the same must be considered upon the Part of the Respondent the Husband as an onerous Purchase, whereby he, for a valuable Consideration given, purchased not only to himself the Right of Liferent, but also the Hope of Succession to the Heirs of the Marriage, to whom the Succession is limited in his Contract of Marriage, and the foresaid Bond of Entail *anno* 1684, being latent, and never put upon Record, cannot operate or take Effect against Creditors or Purchasers for valuable Considerations.

Upon the other Hand, the Petitioner *Thomas Makdougall* brought

brought his Action founded upon the foresaid Bond of Entail anno 1684, for reducing the Disposition anno 1715, made by *Henry Makdougall*, Father to the Respondent *Mrs. Barbara*, and the Marriage Settlement between the Respondents, as being contrary to the Prohibitions contained in the Bond of Tailzie anno 1684, and for declaring and establishing his Titles to the Estate, as being the Heir-male, to whom the same stood limited by the said Bond of Tailzie.

The Case having been heard at great Length before the Lord *Arniston* Ordinary, he reported the same to your Lordships, who, upon the 12th of July last, pronounced the following Interlocutor:

On Report of the Lord Arniston, the Lords find, That the Writer of the Bond of Tailzie made by Henry Makdougall anno 1684, produced as the Title of Thomas Makdougall in this Process, and the Witnesses thereto, are sufficiently designed; and therefore repells the Objection founded on the Act of Parliament 1681; and find that the Faculty contained in the Disposition anno 1668, granted by Sir William Scot of Harden to Henry Makdougall of Markerstoun in Liferent, and to Thomas Makdougall his Son in Fee, and to his Heirs-male, in favours of the said Henry Makdougall, did enable him to dispose of the Estate, not only for onerous Causes, but even gratuitously; and did also enable him to alter the Substitution contained in that Disposition anno 1668; and therefore repel the Objection, that Henry Makdougall had no Power to make the Tailzie 1684; But find that the Bond of Tailzie 1684 having lyen latent, and not having been claimed upon, or any Document taken upon it for upwards of forty Years from the Date thereof, and the Estate having been possess'd by Thomas and Henry Makdougalls, and Barbara Makdougall, the present Possessor thereof, for upwards of forty Years, in virtue of the Disposition 1668, and Infeftments following thereupon, they have the Benefit both of a negative and positive Prescription;

tion; and that the Tailzie anno 1684, cannot now be set up as a Title of Eviction of the Estate from the said Barbara Makdougall, notwithstanding that Henry and Thomas Makdougalls her Father and Grandfather were Heirs by the Tailzie 1684, as well as by the Disposition and Infeftment 1668. And find, That the Minority of Thomas Makdougall, or of William Makdougall, could not interrupt the Prescription, they being only Substitutes by the Tailzie 1684, and the Right thereof not having devolved upon them during their Minority: And find that Thomas Makdougall Pursuer in this Process cannot found on the Minority of Henry Makdougall his Brother, in order to prevent the running of the Prescription in favour of Henry Makdougall himself, and Barbara Makdougall, who derives Right from him. And find, That George Hay having entred into a Marriage-contract with Barbara Makdougall, who stood seised in the Lands by virtue of a Progress of Infeftments, containing no Limitation upon her or her Father; and having become bound to advance L. 1500 Sterling towards Payment and Extinction of the Debts of the Family, in Contemplation, and upon the mutual Agreement of the Estate's being settled upon him in Liferent, and the Heirs-male of the Marriage, the Contract was fully onerous, and therefore must be available and subsist according to the Conception thereof, in favour of the said George Hay, and the Heirs-male of the Marriage, notwithstanding of the latent Tailzie 1684, the same never having been recorded, nor any Infeftment or Document whatsoever taken thereupon; and therefore decern and declare in the Reduction and Declarator at the Instance of the said Barbara Makdougall and George Hay her Husband, and assoilzie them from the Reduction at the Instance of Thomas Makdougall.

The Petitioner has reclaimed against so much of this Interlocutor as was given against him; and though the Respondents were also entitled to reclaim upon such Points of the

the Interlocutor as were given against them; yet as the Interlocutor now pronounced determines sundry Points in favour of the Respondents, each of which are by themselves sufficient to carry the Right of the whole Estate in question to them; therefore, without giving your Lordships further Trouble, they shall confine themselves entirely to the answering of the Petition.

The Petitioner has been pleased to impugn your Lordships Interlocutor, at least pretty roundly, and, at various Periods, he supposes the Force of his own Arguments to be so strong, that he perswades himself, that your Lordships must alter, or at least vary your Interlocutor; and yet the Respondents humbly hope they shall be able to show, that the Arguments set forth in the Petition are noways sufficient to support so strong Conclusions.

The Points laboured in the Petition are in Substance these, Whether the Deed of Entail executed *anno* 1684, can in Law be held to have been lost by Prescription. *2dly*, Whether the Marriage Settlement executed between the Respondents *anno* 1733, be such an onerous Contract as that the foresaid Entail cannot operate against it.

And the first Point touching the Prescription naturally branches out under two Heads, first, Whether the said Entail, under the Circumstances of the present Case, be a Right prescriptable? And, *2dly*, Supposing it to be prescriptable, whether the Prescription can be held to have been interrupted by Minorities?

And with respect to the Prescription, as the Interlocutor determines the Right of the foresaid Entail to be extinguished and lost, both by the negative and positive Prescriptions, the Respondents shall consider the Case in both these Views.

And with respect to the negative Prescription, it may be observed, that though the old Statute 1469, which first introduced such Prescription, makes only mention of Obligations

tions, yet the Practice has now long ago extended it to sundry other Cases, even to all Rights whatever, insomuch that an Assignment to a Debt has been found to be cut off by the negative Prescription, where the Debt itself was found saved from Prescription, and a second Assignment preferred to the first, because no Document had been taken upon it for the Space of forty Years, as was determined the 26th of *November 1728, Fraser contra Mackenzie*: So that there can remain no Doubt that the Bond of Tailzie in Question, as containing Obligations, Limitations and Burdens upon the Right of *Thomas Makdougall* the first Fiar, is a Subject capable of Prescription.

But then the chief Objection urged in the Petition is, That as the Right of Fee, both by the Investitures 1669, and by the foresaid Entail 1684, stood vested in the same Persons, as being Heirs of both Rights, that therefore until the Rights separated and became competent to different Heirs, there were no *termini habiles* or Place for Prescription, because, until that Time, the same Person was both Debtor and Creditor in the Obligation.

As to which it may be observed, that if no other Person either were or could be Creditor, but he who is considered as Debtor, by being burdened with the Entail, to wit, the Fiar in Possession, the Plea of Prescription would be extremely idle, as indeed all other Pleas of the Law would be, between one and the same Person: But that is noways the Case here; for there were at all Times other Persons who had an Interest to take a Document upon this Entail, if they had so thought fit.

The first *Henry Makdougall*, the Maker thereof, might, if he had pleased, have not only registrated it, but have completed it by Infeftment, and his not doing so, was so far a Dereliction and Non-usage of this Entail, and after his Decease every one of the Substitutes had a Right to sue for Registration and Completion of it; and therefore the Silence of
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all these Parties during the Years of Prescription, while nevertheless it was competent to them to have taken a Document upon it, presumes a Dereliction, and must induce a negative Prescription against it, as much as against any other Right whatever.

Nay the very expectant Heirs, to whom it was competent to have taken a Document upon this Entail, may even be supposed, for the Sake of an Expectancy of the unlimited Fee of the Estate, to have waved their Interest in the strict Entail, and so tacitly to have derelinquished it.

And tho' your Lordships have in some Instances found, that the Possession of a Liferenter will interrupt the Prescription of the Fee-right, because the Fiar during the Life of the Liferenter is under a Disability to sue for Possession effectually, yet the Case is not the same here, because from the Date of the Entail in the 1684, down to the present Time, there was always some Person to whom it was competent to have taken a Document upon this Entail, such as suing for Registration of it, or Completion of it by Infestment, an Act very necessary for the Preservation of it, if they had been so minded, or had so intended it; and which Document so taken upon it, would have been nowise inconsistent with the Right of the Tenant in Tail, which would nowise be the Case of a Fiar suing for Possession, when he knows that he is excluded by a Liferent-right; so that in respect of the Entail in Question, it cannot be said that at any Time the Persons interested were under a Disability to take a Document upon it, or under a *non valentia agere*,

The Petitioner pretends, that the several Statutes touching Prescription and the Limitation of Rights, always suppose different Persons, to wit, one to whom the Right is competent, and another against whom it is pleadable; and from thence argues, that unless such were the Situation of the Case, there can be no Place for Prescription.

But, with Submission, such Observation seems to have no

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Force, when it is considered, that these Statutes, as well as all others, proceed upon what is supposed usually to happen; for the Wisdom of no human Legislature can comprehend all possible Contingencies; and it would have been quite frivolous to have considered in the Statute a pleadable Right, where one Party only was solely interested, without supposing some other Person, against whom it could be pleaded; but the Respondents can observe nothing arising from the Statutes of Prescription, that can preclude a Person who may happen to be possess of two Titles to a Subject, from using the one, and utterly dereliquishing the other, and suffering it to be sopite by Prescription, so as that it can never be revived again.

It is certain that it would be quite useless to treat of Things, unless Persons were supposed capable of acting upon them; but when the Statutes of Prescription are considered, it is humbly submitted to your Lordships, whether they are not rather directed with respect to *Rights*, than with respect to *Persons*, and whether they do not plainly enact, that such Obligations and other Rights in whatever Person they may stand vested shall be lost by Prescription, if no Document is taken upon them during the Space of Forty Years.

If a Person has two Rights vested in him, but the one fuller and more beneficial than the other, to be sure it is his Interest to take up that which is most beneficial; and it would be absurd to suppose that he should keep up the lesser Right, in order to operate against the fuller; and therefore all the Rules of Reason direct to the repudiating of the lesser Right, which if taken up would be inconsistent with the fuller: And if the Person principally interested, and in whom the Right is immediately vested does thus neglect it, and leave it in the Hands of Time to abolish it; and if all others more remotely or consequentially interested do the same, there seems to be no good Reason why such Right, as well as all others, should not be held to be lost by the Lapse of
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Forty Years, without any Document being taken upon it, especially that it has been shown, that there were at all Times Persons other than the Tenant in Tail, who had a competent Remedy for preserving this Entail, if they had intended it should have been preserved. There is no Person to whom a Right is competent, but they have also a Remedy for attaining their Right; and if Persons neglect the Remedy that is competent to them, their Neglect must operate against them.

The Petitioner argues, That when a Person is in Possession of Lands, and has sundry Titles in his Person, tho' he cannot invert the Title of his Possession in Prejudice of him from whom his Title is derived, yet he can defend against third Parties upon either of the Titles; and he says that the negative Prescription will not run against them.

But, with great Submission, the Respondents cannot at all admit of this Doctrine, without such Limitation as they conceive will intirely defeat its Application to the present Case; for they apprehend, that the Petitioner's Canon can only hold where such Rights could have been the Titles of Possession: In which Case the Reason is plain, because Possession had is a daily Document taken upon the Right; but if such Rights could not be the Titles of Possession, they apprehend the Case will stand quite otherwise, and the Rights be liable to the negative Prescription. And in the present Case, the Charter and Infestment *anno* 1669, behoved to be the only Title of Possession; nor could the Bond of Tailzie in Question be any such Title, the Procuratory therein contained never having been executed, nor any new Investiture taken upon it.

But then the aforesaid Bond of Tailzie could not be the Title of Possession upon another Account, because it neither ever was in the Hands, so far as appears, or so much as known to any of the Heirs in Possession; and it is hard to conceive how a Right neither known to, nor in the Possession

session of the Person, can be said to be the Title of his Possession.

But then, *2dly*, The Rule laid down in the Petition, that a Title in the Person of a Possessor cannot prescribe, taking it for once in as large an Extent as the Petitioner would have it, cannot apply to the present Case, because it is only introduced in favour of the Possessor, and pleadable by him, but cannot be pleaded against him; for if the Case shall be supposed, that the Deed 1684, instead of being an Entail of the Estate, had been a Disposition of the Lands to *Thomas* and to the same Heirs, as contained in the Infeftment 1669, without any Limitations, but only under the Burden of the Payment of a certain Sum of Money to a third Party: And suppose that such Disposition had lyen latent till now, and that the Creditor in the Sum should claim the Money from the Heir in Possession; if the Heir should plead Prescription, and no Fraud could be objected, it seems, with Submission, impossible that the Creditor could, against the Heir's Will, impute his Possession to this latent Deed.

And therefore when one has two Titles in his Person, whereof the one is more beneficial than the other, and wisely chooses to expedite the more beneficial one, so as to make it the Title of his Possession, neglecting the other in a State that it could not be the Title of Possession, without taking any Document upon it for the Space of forty Years, so as by Lapse of Time it may prescribe, the supposing Prescription to run in such Case, is, as the Respondents humbly apprehend, neither splitting of Hairs or Persons, or making the right Leg prescribe against the left, but is plainly of two Rights, the choosing the most beneficial, neglecting and repudiating the other, and suffering it to be utterly abolished by Lapse of Time; neither is the present Case similar to that which happened between the Earl of *Dundonald* and the Marquis of *Clydesdale*; for in that Case both Titles were equally good Titles of Possession, as well that against which
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the Prescription was pleaded, as the Charter 1680 upon which the Marquis founded his Title; and so the Possession was an equal Support to both Rights. Beside that, the Earl of *Dun-donald* had a reserved Liferent which run to the 1685, the Time of his Death, and the Process between the Parties was commenced in the 1725; so that deducing the Years of the Earl's Liferent, which, according to the common Practice, fell to be deduced, there was not Place for Prescription; and your Lordships, by your Interlocutor in that Case, having simply repelled the Alledgeance of Prescription, it cannot appear upon what particular Ground the Interlocutor repelling the Prescription proceeded.

But, with Submission, it is without Foundation what is affirmed in the Petition, That the Arguments adduced for the Respondents upon this Head cannot be the native Consequences of the Rules of Prescription, but must be the Offspring of Ingenuity, never broach'd until the Case above mentioned came to depend between the Earl and the Marquis; because there is a Case stated in the Respondents Information, that of *Innes of Achlunkart*, observed by the Lord *Fountainhall* as early as the 1695, wherein the Matter was determined in Point in the same Way as is now pleaded by the Respondents, but which will fall more naturally to be considered under the positive Prescription.

The Petitioner supposes, That if *Thomas Makdougall* had lived a hundred Years, and that in the End of his Days he had founded upon this Bond of Entail, Prescription could not have been obtruded; and from thence infers, that if it could not be held prescribed as against him, that therefore it cannot be held as prescribed against others who were only to take after him, without allowing *Thomas* a Power of conjuring, and showing it dead or alive according to his Fancy.

But the Respondents cannot admit, but that if *Thomas* had left it in the same State it was in, a far less Space than a hundred Years without taking any Document upon it, and had

then founded upon it, (a Case nevertheless which can hardly well be supposed) it would have been held as prescribed even as against him.

But whatever be in that, it is nowise incongruous that Prescription should be pleadable by one Party, and yet not pleadable by another; this is what often happens in the Case of Minorities, and of Interruptions used by one Party which will not profit another; and why should not this also hold with Respect to the Possession of one Party? which supposing he were at Liberty to ascribe to a certain Right, in order to save it from Prescription, where it is beneficial for him, yet it will not from thence follow, that another Party can impute his Possession to keep a Right alive which is hurtful to him.

Suppose the Case of an Assignment to a Debt, which would be lost *non utendo*, but the Debt itself is preserved from Prescription by Diligence done in the Cedent's Name, it is plain the Debtor cannot object the Prescription of the Assignment, but must pay the Assigny: But if we suppose a second Assigny, who could claim Preference to the Debt, if the first Assignment were removed, he can plead Prescription, and will prevail in it, as was found in the fore said Case of *Fraser* and *Mackenzie*.

So that it is no new Thing, nor unknown in the Law, without the Help of Conjuraton, that the negative Prescription may be sustained when pled by one Party, and repelled when pled by another.

And indeed when this whole Matter is considered, there appears no Incongruity that Prescription should run against a Right granted to the Party who pleads it, when ever such Right, though nominally conceived in his Favour, is truly detrimental to him, gives him nothing, but on the contrary takes from him, by limiting, burdening, or restricting a Right which he had before.

It has been already observed, That the Interruption of the Course of the negative Prescription, indulged on account of sup-

supposed Disability to sue, where a Person is termed *non valens agere*, only takes place where such Action would be utterly ineffectual, such as suing upon an Obligation already incurred, but where the Term of Performance is deferred to a distant Day; but such was nowise the present Case, because very proper and beneficial Actions lay for taking a Document upon the present Bond of Entail, if it had been intended to have been taken up, such as an Action for Registration of it, or for Completion of it by making the Right real; and as the proper Parties lay under no Inability to sue forth these Actions, their Silence and Neglect for much more than 40 Years ought to induce a Prescription of the Deed.

Neither with Submission are these Interruptions of Prescription indulged on account of Parties being supposed *non valentes agere*, at all to be extended; because in many Cases that may be figured, Prescriptions at such rate may not run for the Space of a hundred Years; and surely the Quiet of People's Minds, and the securing of their Rights by some length of Time, against Claims which may strip them of their all, ought to preponderate against any Indulgence which a Party deserves, who has neglected, for the course of the Years of Prescription, to insist in an Action that was competent to him, on pretence that he could do it with more Convenience or Benefit at another time.

The Petitioner argues, That *Thomas Makdougall* could not by any Act of his defeat this Entail founded upon a Quality in that Right, which was his own Title; and from thence infers, That no Negligence of his, or presumed Dereliction could defeat it.

But, with Submission, it appears plain, that the consequence which the Petitioner draws cannot hold good; for supposing the Heirs in Possession upon the Investitures to have been different Persons from the Heirs in this Bond of Entail, all of the Heirs of Entail joining together, could not by any positive Act have defeated the Force of the Entail,
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because of the *jus quasitum* to the Heirs unborn; and yet there seems to be no Question but that their Negligence or Dereliction of it during the Years of Prescription, would have abolished it by the negative Prescription, because the Force of the Law is stronger than any Act of the Parties can be.

The Petition sets forth, That until *Thomas* entred into Possession upon the Death of his Father, it was uncertain what Title he would use; and therefore, that until the Death of the Father, the Prescription could not begin to run.

But the Answer is obvious, that as the Father, the Maker, took no Document upon this Entail after its Date, which nevertheless was very competent to him either by Registration of it, or taking Infeftment upon it, so far it was by him derelinquished; and as *Thomas* the Son, supposing him to have known of it, took no Document upon it, nor endeavoured in any sort to perfect it, so as to make it a Title of Possession, but continued the Possession upon the Title that was in him, so far also he must be held to have repudiated it; and therefore the Petitioner very justly supposes that your Lordships Interlocutor upon this Point means the Prescription to have begun to run from the Date of this Bond of Entail.

The Petitioner further argues, That if the Substitutes in the Entail be the Persons against whom the Prescription runs, that it ought to be considered that their Right only took place from the Failure of the Institute, and his Heirs, the Right of the Substitutes being conditional; and affirms it to be a Rule, That in conditional Rights, Prescription can only run from the Existence of the Condition.

But if this Doctrine again should hold good, then every new Substitute in an Entail, must have a new Course of the Years of Prescription competent to himself, and which would only commence from the time the Succession devolved upon him; and if this was the Case, it is morally impossible that any Entail could ever prescribe, not even after the Line of Heirs
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of Entail came to be separate Persons from the Heirs in Possession; for even in this Case, the Heirs unborn must be taken into the Scale, who have equally a *jus quæsitum* with the existent expectent Heirs.

But, with great Submission, the Petitioner's Error lies in this, That he has laid down one favourite Hypothesis, in order to rear such Arguments upon it as may best suit with his Case, namely, That the negative Prescription is directed against a Person, whereas truly it is directed against the Right; and therefore if the Foundation be infirm, the Superstructure must fail; and as the Prescription arising from the Statute relates to the Entail, if the Right of the Entail is prescribed by the Dereliction of these Persons who were entitled to found upon it during the Time that the Prescription was running, which no doubt it would by the Lapse of forty Years, without some Document taken by them upon it, it will be as effectually extinguished as to all succeeding Substitutes, who might in course of Time have had Interest to found upon it.

But then, if the Matter is considered upon the Foot of the positive Prescription, beside that all the Arguments used for the Negative's taking Place coincide, and work in favour of the Respondents, and in Support of the Interlocutor; yet the further Considerations drawn from the Nature of the positive Prescription do concur, with a strong additional Force to support the Respondents Right: For,

By the Act 1617, whereby the positive Prescription is introduced, it is apparent that the Statute intends absolutely to secure real Rights and Infeftments upon Lands, when cloathed with Forty Years uninterrupted Possession; when it enacts, that the Rights of the Person so possess shall not be liable to challenge upon any account whatever except Falshood, which seems principally intended to cut off all latent Rights that might compete with them, and to quiet People's Minds in the Enjoyment of their Property, and to give them an absolute Security from the Records; and there is no Di-

inction made, whether these competing Rights have, during the Course of Prescription, been devolved upon different Persons, or upon one and the same Person, the main Design being to give an absolute Security to a Right so possessed and enjoyed.

And if both Rights their having for some Time been competent to the same Person made any Difference in this respect, or prolonged the Time of Prescription, it is certain that the main End of the Statute, and the Security arising from the Records must be intirely defeated, because such latent Entails as the present would almost be excluded by no Length of Time, but might be brought out even after Centuries, to overturn the Securities of Property that had been peaceably enjoyed, without any Challenge during all that Time; which is such an Absurdity, as surely cannot reasonably go down.

For if the Right of the Lady *Makerstoun*, in the present Case, can be shaken upon such Subtily in Law, as is urged in the Petition, then the Consequence will be, that supposing that she and her Predecessors had possessed upon such Rights for Centuries without any Challenge, (for if Forty Years is not sufficient, neither will the greatest Length of Time be) and that afterwards a Person came to purchase from her for valuable Consideration, trusting to the Security of the Records: If the Petitioner's Doctrine shall take Place, out comes such latent Entail as the present, forged possibly, for any Thing that can appear, because by Length of Time, all Means for improving it must probably be lost, and by such latent Entail, the whole Security of the Purchaser is destroyed, his Right is taken from him, and at the same Time his Money is lost, without any possible Remedy or Reparation to be given to him; and if such Rights as these can be so overturned, it was useless in the Law to pretend to give a Security, and was truly ensnaring to bid Purchasers rely upon the Statute, both the Words and the Meaning of the Law being intirely defeated by such Subtily as is urged in the present Case.

And

And here the Respondents cannot help again insisting upon the Decision mentioned in their Information, in the Case of *Innes of Achlunkart*, observed by the Lord *Fountainhall*, anno 1695, as being a Decision in Point, which cannot fail to be of great Weight, tho' not backed or confirmed by others, seeing a Case such as the present can so rarely occur ; That Case as determined stood thus : An Estate had been posselt for upwards of Forty Years, to wit, from the 1648 to the 1692, and the Estate being then claimed by a collateral Heir-male, upon a Bond of Tailzie granted in the Year 1641, and the Possessor defending herself upon the positive Prescription arising from the Investitures, and so long Possession ; it was objected to her by the Heir-male as in this Case, That until the Year 1692 the Heirs never came to divide, but that the Estate had been posselt by the same Heirs who would have been entitled by the Bond of Tailzie ; and the Lords Found the Bond of Tailzie extinct by the said Prescription, and preferred the Heir-female.

Besides that, it may be a great Question whether the Topic of *non valens agere* can at all be pleaded against the positive Prescription, the Statute aforesaid introducing it having only made an Exception as to Minority, which is declared by the Statute to be an Interruption of the Prescription, whereby all other Exceptions seem to be cut off. Nay further, the Statute makes the positive Prescription to work against the Crown, which otherwise it may be supposed it would not have done, whereby it seems that it was intended by the Statute, that the positive Prescription should work an absolute Security of Property, with an Exception only as to the Years of Minority, that these should interrupt the Years of Prescription ; and indeed unless it shall be so taken, the Security arising from the Records chiefly intended by the Statute can be of little or no Use ; because if these *non valentias agere* be sustained and extended, many Cases may be figured, where Prescription cannot take Place for a Century.

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And further, the Intention of the Statute, which seems anxiously to guard against forged and false Titles, must be intirely defeated ; because, if Persons are so wickedly disposed, false Titles may be executed, and let ly over until sanctified by Length of Time, when no Means or Evidence of improving them as false may be had, while in the mean Time the Proprietor is quietly enjoying, as supposing himself to be under an absolute Security upon the Faith of the Records.

Neither is the Decision in the Case of *Dundonald*, nor is there any one other, so far as appears, repugnant to the Determination above noticed in the Case of *Innes of Achlunkart* ; because it has been already observed, that your Lordships Determination in the Case of *Dundonald*, whereby you repelled the Alledgeance of Prescription, was nowise founded upon the Plea set up by the Petitioner, namely, that both Rights stood vested in the same Persons, but appears to have proceeded upon other Grounds, as has been above noticed.

The next Point argued in the Petition against the Prescription's taking Place is, That supposing there were *termini habiles* for Prescription ; it must be held to be interrupted by Minorities, to wit, both by the Minority of the first Institutes, and that of the Substitutes in the Entail.

But, with Submission, it seems plain, that the Minority of the Substitutes cannot operate, because, in a common Case, it is only the Minority of the Person vested in the Right that can operate against Prescription ; and if he is Major, and silent upon his Right during the Years of Prescription, the Minority of the Heirs expectant after him can operate nothing, the Right will be utterly abolished by Prescription ; and were it otherwise, no Prescription could ever run against latent Entails, because where there are several Branches of Substitutes before one of them is Major, some one or other of them will probably be born ; and so if the Minority of
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the several Substitutes interrupt, there must be a perpetual Course of Minorities, which will make the Right altogether unprescriptible; besides, why may not by the same Rule, the *jus quæsitum* that arises to the Heirs unborn, afford them a Ground of Interruption? for surely the *non nati*, if one may so speak, are of of all others under the greatest Incapacity of acting.

Neither, with Submission, is what is offered in the Petition at all a sufficient Answer to this, namely, That the Absurdity arises from the Position maintained by the Respondents, that the Prescription may run, where the two Deeds are conceived in Favour of the same Person.

For even in the Case, where the two Lines of Heirs, in Favour of whom the several Deeds are devised, have divided; in which Case nevertheless no Body can maintain, but the Prescription may run against a latent Entail, if the Minority of every Substitute shall interrupt, agreeable to the Petitioner's Doctrine; it is morally impossible that the Prescription can ever take Place; for either the Tailzie would be very thin of Branches, or the Branches very unfruitful, if any one Period of Time can be found, when some one or other of the Substitutes is not Minor; so that by the Petitioner's Argument, here is a latent Entail, of all other Rights the most unfavourable, which no Length of Time can abolish by Prescription.

And if it shall be said, that the Minority of the first Substitute is only to be computed, so as to deduce from the Prescription, as if he were the proper Creditor at the Time, yet, with Submission, this is a Scheme intirely arbitrary, patched up only on pretence to obviate an Absurdity, but without the smallest Foundation in the Principles of Law. For why is the first Substitute a Creditor more than any of the rest? Are not each of the remoter Substitutes in their Order Creditors as well as he, and of Consequence whose Minorities ought equally to interrupt with that of the first Substitute?

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And

And the Petitioner has said in another Part of the Argument, that your Lordships ought to consider, that the Right of the Substitutes is a conditional Right, and that it is a Rule, that in conditional Rights Prescription can only run from the Existence of the Condition; and if such is the Case with respect to one of the Substitutes, it must be the same with respect to them all.

And indeed there is no Difference in this Respect, this first Substitute has no more but an Expectancy, and so have all the rest in their Course; and it very often happens, that the Right may not devolve upon the first Substitutes, but upon those that are placed more remote at the Time of making of the Deed; and therefore if all or each of their Minorities do not interrupt, neither can that of the first Substitute; for no Action is competent to him, but what is competent to every one of them; and so no Difference can be made between the one and the other, but the Rules of Law must be adhered to, by which an Expectancy or *spes succedendi* does not intitle such expectant Heir to plead his Minority as sufficient to interrupt the Course of Prescription; the Minority of the Person vested in the Right, and of none other, is to be regarded.

If it should be said, that the Minority only of the nearest Substitute existent for the Time is to be regarded, and that he will be the Person against whom the Prescription may run, and whose Minority will be deduced:

Yet this also is but an arbitrary Scheme, without Foundation in Principles; for a Case may be figured, where there shall be no Substitute at all in Being during the whole Course of the Years of Prescription: For suppose, that in this Bond of Entail the Limitation of Heirs had gone no further, but to the Heirs of *Thomas* his Body, and that he had survived his Father for 40 Years without any Heirs of his Body, the positive Prescription must have run upon the Investitures 1669, and the Entail 1684 cut off, if we suppose it a Right
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at all prescriptable, which it has been above shown to be, and in this State of the Argument must be supposed: And therefore if the Prescription would have run, when none of the Heirs-substitute were in Being, can it stop or be interrupted because of their Minorities?

The only other Minority that can fall within the Question, is that of *Henry Makdougall*, the Son of *Thomas* the first Institute, and Father of the Respondent Mrs. *Barbara*, and the Question will be, whether his Minority can interrupt the Prescription?

As to which it seems plain and obvious, that it cannot, because the Privilege granted to Minors is intended only for their Benefit, and is only pleadable for them, where such Benefit may arise to them, but cannot be pleaded by others against them, to their Detriment.

From whence we humbly hope, that it is apparent, that the Entail 1684, now in Question, is a Right prescriptable, and that there are also *termini habiles* for Prescription, and that there are no Minorities in the Case, whereby the Course of that Prescription could be interrupted; and of Consequence, that your Lordships Interlocutor complained of, so far as relates to the Prescription, is well founded.

The next Point argued in the Petition, is against such Part of your Lordships Interlocutor, which upon a separate Argument, and supposing that this Entail could be pleaded upon as not cut off by Prescription, finds, “ That the Marriage-
“ Covenant executed between the Respondents, is such an
“ onerous Contract, as that the Entail in Question cannot
“ operate against it; but that the Provisions therein con-
“ tained, must be available, and stand good, both in Fa-
“ vours of the Husband, and the Heirs-male of the Mar-
“ riage, notwithstanding of this latent Entail.”

And upon this Head the Petitioner argues, That neither the *bona fides* of the Parties, the Onerosity of the Contract, nor the Faith of the Records, can give any Aid towards its
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Subsistence, because that the Parties contracting must have known that the Right of Fee in the Person of Mrs. *Barbara* stood subject to the Qualities in her Predecessor's Rights, and that the Right of *Thomas* her Grandfather, from whom she derived Right, was subject to the Powers reserved by *Henry* his Father, and of consequence, that the Right of Mrs. *Barbara* was subject to this Entail made by *Henry*, so that the Parties contracting in the Marriage Settlement, entred into the same upon their Peril, as knowing that they must take their Chance of any Acts exercised in force of the reserved Powers, whereof the Entail in question was one; and that as the Right in the Person of Mrs. *Barbara* was reducible upon the Entail, so any Right by her granted fell of consequence, because *resoluto jure dantis resolvitur jus accipientis*.

2dly, For that with Respect to the Heirs of the Marriage between the Respondents, the Petitioner affirms, That he is persuaded your Lordships must be of opinion, that they must succeed as Heirs of Provision to their Mother, who herself being under an Obligation to implement the Entail in question, could not alien the Estate gratuitously, or give it away from the Heir of Entail, who is the Petitioner.

But here, with Submission, the Petitioner's Arguments fail in every Respect; for with Regard to the first Point, he carries the Matter so far, as if this Entail would have annulled any Purchase of this Estate, made for valuable Consideration, from *Henry Makdougall* Father to the Respondent the Lady *Makerstoun*; than which, with Submission, nothing can be more absurd. For

In such Case the Right of the onerous Purchaser would not have proceeded *a non habente potestatem*, and have been reducible upon the Petitioner's Maxim of *resoluto jure*, &c. but only the Right of such onerous Purchaser would have proceeded from one whose own Rights was subject to the reserved Powers of another, either to alter or burden the Right; and

and yet even though in consequence of the reserved Power, the Right of the Seller had been so altered or burdened, no Deed done in consequence of that reserved Power would have been effectual against the Purchaser, unless it had not only been exercised, but had been made real upon the Estate before the Purchase, as was solemnly determined, as observed by *Home, February 1719*, in the Case between *Thomas Rome* and the Creditors of Provost *Graham*, and is now established Law, whereof no Body doubts, being the same with general Burdens and reserved Faculties, which though they be Qualities in the Right of the Fiar in Possession, yet unless such be made real before any Purchase for valuable Consideration made from the Fiar in Possession, they cannot operate against such Purchaser, a Point which at this Time of Day can hardly be doubted of.

And therefore, whatever Qualities or reserved Powers the Right of Fee in the Person of *Mrs. Barbara* might be subject to, it was enough for the present contracting Parties in the Marriage Settlement in question, that they were certain from the Records, that such reserved Powers had never been exercised so as to be made real upon the Estate, and therefore were in great Safety, and *in optima fide*, as resting upon the full Security of the Law, that any latent Exercise of such Powers could not prejudice or derogate from their Contract.

And if a Purchaser from the late *Makerstoun*, Father to the present Lady, would have been safe against any such latent Deeds as the present Entail, a Purchaser from the Daughter must be equally safe, for her Father was equally liable with her to have implemented the Deeds of his Ancestors, to whom he was served Heir, and amongst others, to have completed and made good the Settlement of the Entail 1684, taking it, that it had not been cut off by Prescription, and that the Contest had only depended between the several Heirs; and yet such latent Entail as the present could not have operated

rated against the Right of a Purchaser for valuable Consideration from either of them.

As to the Argument insisted on in the Information heretofore preferred to the Court for the Petitioner, but which is dropt and not resumed in his Petition, namely, That the Disposition by the late *Makerstoun* to his Daughter one of the present Respondents, bearing to be for Love and Favour, was reducible upon the Act 1621, at the Instance of the prior Creditors of the Disposer, such as the Petitioner Creditor in this Entail, even as against Purchasers for valuable Consideration from the gratuitous Disponee; because that such Purchaser saw the Defect of his Author's Right, namely that it was gratuitous.

But this Argument fails in two Particulars; for first the Act 1621 does not concern, nor was it intended to secure latent Deeds such as the present Entail, nor do such deserve any Favour in competition with Purchasers, this Act, so far as regards Purchasers, being only intended to secure anterior Creditors for valuable Consideration.

Secondly, There is no Place for a Reduction in the present Case upon the Act 1621; the Heirs to whom the Succession was limited in the Entail 1684, have no Title to reduce the present Lady *Makerstoun's* Infeftment, the most that she could have been compelled to, even suppose there had been no mid Impediment, as in the present Case, by an onerous Purchase, would have been to have implemented the Entail, by resigning in Terms thereof; and in case she had failed, the Estate might have been taken out of her by an Adjudication; but at no rate could her Infeftment have been reduced, for it is only gratuitous Rights in favour of third Parties that are liable to Reduction upon the Head of the Act 1621, but noways the Rights of Heirs which are taken up by Service, for such Rights can never be reduced upon any prior Debts of the Heir's Predecessor.

And far less can the Right of a Purchaser for valuable Consideration.

sideration be liable to Challenge, because if such were the Case, a Purchaser could never be secure against latent Debts of his Author's Predecessor, every one of which would, according to the Petitioner's Plan, be as effectual against the Purchaser, as if an Inhibition had been used and executed for them before his Purchase, than which, with Submission, nothing can be more absurd.

And that the Stipulations in the Respondents Contract of Marriage was of the Nature of an onerous Purchase, seems to be extremely plain, not only from the Nature of the thing, but from the Determinations of the Court, as appears from the decided Case formerly mentioned in the Respondents Information of *Muirhead of Drumpark*, determined the 17th of *January* 1724, as observed by *Home*, where an Heir passing by, was found liable to fulfil the Provisions of an Estate made in a Contract of Marriage by the Ancestor, whom he had past by, but who had never made up his Titles to the Estate, only had been more than three Years in Possession.

With respect to the second Point in the Petition argued upon this Head, how far the Provision of the Estate in the Contract, to the Heirs of this present Marriage, can be available, because that they must take as Heirs of Provision to their Mother: From whence the Petitioner argues, that they must be liable to all such Deeds whereunto she was liable, one of which he contends was Implement of this Entail in question.

The Answer is, That as the Respondent, the Husband of the Marriage, must be considered as an onerous Purchaser in such Rights as he acquired in Favour of himself, so he must also be supposed to have purchased the Hope of Succession to his Children; and in that Sense the Issue of the Marriage must also be considered as onerous Purchasers: For it is irrational to suppose that the Husband would have entered into the Covenant, unless the Estate had been provided to the Issue of the Marriage: So that the Heirs of the Marriage must also in the strictest Sense be considered as onerous Purchasers; and

and though they take as Heirs of Provision to their Mother, yet, as they are also Creditors in the Obligation, they are not bound in any Implement as Heirs to their Mother, which would absolutely defeat their own Right, and of consequence not bound to implement this Entail, whereby the Estate would be entirely taken from themselves; for such Instances frequently occur, as in the case of a Cautioner for the Husband contracting in Contemplation of Marriage, that the Provisions to the Issue thereof shall be effectual; in such Case, tho' the Heirs of the Marriage must take as Heirs of Provision to their Father, who himself would have been liable in Relief to the Cautioner, yet such Heirs of Provision are never made liable in such Relief, only because their being so liable, would entirely defeat the Effect of their own Provisions, and sundry of such Cases have been lately decided, and are well known to your Lordships; and as the most of the Land-securities, and other the most valuable Interests of the Nation, are at least almost once in every Age conveyed in Contracts of Marriage in Favour of the Issue thereof, if such Settlements could be shaken and overturned, upon such latent Deeds as the present, the whole Securities of the Nation might be overturned, and no Faith could be had in Marriage Settlements, the Securities of which being of all others the most onerous; and *bona fide* Contracts ought to preponderate against all such latent Deeds as the present, as being of all others the most unfavourable.

In respect whereof, the Desire of the Petition ought to be refused.

JA. GRAHAM jun.

